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Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

WAYNE ALLEN FLETCHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether making a false, fictitious or fraudulent claim to the government (18 U.S.C. § 287) is a specified unlawful activity under the money laundering statute (18 U.S.C. § 1956) in the Fourth Circuit, in conflict with the express language of the statute and the law of other circuits.

2. Whether the Sixth Amendment was violated by the district court's refusal to order the release the untainted assets in a manner which would allow petitioner to make use of those assets in his defense at his criminal trial.

3. Whether the Fourth Circuit's judgment must be vacated and the case remanded in light of the decision in *United States v. Booker*, __ U.S. __, 125 S. Ct. 738 (2005), holding that the Sixth Amendment is violated by the imposition of an enhanced guidelines' sentence based upon a judicial determination of facts that were not found by a jury.

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Petitioner, Wayne Allen Fletcher, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is unpublished. App. 1a-2a. The opinion of the district court is unpublished. App. 3a-7a & 8a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on November 19, 2004. A petition for rehearing was denied on December 21, 2004. App. 9a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The relevant constitutional and statutory provisions involved are set forth in an appendix to the petition. App. 10a-19a.

STATEMENT OF THE CASE

Petitioner was convicted of a federal crime – money laundering – based upon the jury's determination that he submitted false claims to the government in violation of 18 U.S.C. § 287 and laundered the proceeds of that offense. This conviction was affirmed by the Fourth Circuit even though the money laundering statute, 18 U.S.C. § 1956, does not include 18 U.S.C. § 287 among the listed predicate offenses necessary for a violation of the statute. In upholding the conviction, the Fourth Circuit has essentially ruled,

without discussion, that § 287 can be the specified unlawful activity necessary to support a money laundering conviction. This holding places the Fourth Circuit in apparent conflict with the express statutory language of the money laundering statute and with other circuits that have generally addressed the definition of a specified unlawful activity under the statute.

1. Factual Background

During the Fall of 1996, petitioner, Wayne Allen Fletcher, was the comptroller and a senior employee of Johnny F. Smith Truck and Dragline Service, Inc. ("Smith Truck"). (R. 497). Smith Truck was a company based in Slidell, Louisiana which had deep experience in preforming cleanup operations in the wake of hurricanes and other natural disasters. (R. 493-498). On September 6, 1996, Hurricane Fran struck North Carolina. (R. 196). In his capacity as a senior employee, Fletcher supervised all of the Smith Truck's disaster work in North Carolina following Hurricane Fran. (R. 504). In working for Smith Truck, Fletcher became involved in three cleanup contracts. The evidence at trial focused on these three contracts and, more particularly, on claims made for payment under these contracts; claims which the government alleged where knowingly false when submitted.

2. The District Court Proceedings

Petitioner was indicted by a grand jury sitting in the Eastern District of North Carolina and charged with conspiracy, submitting false claims, money laundering, receiving kickbacks, possessing false documents, obstruction of justice and witness tampering. (R. 19-34). Approximately six months after the indictment was returned, the government

filed a civil suit against Fletcher in the Eastern District of North Carolina alleging violations of the False Claims Act and seeking injunctive relief, in the form of an asset restraining order, and requesting the issuance of attachments under the Federal Debt Collection Procedures Act. (R. 67). The government took this action in order to secure the assets in the event of a civil judgment, not based upon a claim that the assets were tainted by the alleged criminal conduct or otherwise subject to forfeiture.

The effect of this action was to deprive Fletcher of all his property and, thereby, his ability to pay counsel to defend him in the criminal case and to pay expenses necessary to his defense. (R. 96-97). Fletcher filed a motion seeking to have assets released to permit him to pay criminal counsel and the costs of defending against the criminal charges. (R. 66-73). Due to a variety of circumstances, including an attempt by the parties to reach an agreement on the issue, a hearing on the motion was not held for several months. On December 11, 2002, the district court held a hearing and ruled on two related motions which were pending before the court. The first motion sought release of petitioner's property from government restraint in order to pay attorneys' fees and defense costs. The second motion, filed on December 6, 2002, sought a continuance of the January 13, 2003 trial date for various reasons. (R. 106-111). The continuance motion specifically referenced the scheduled hearing on the asset restraint issue, as well as need for time after the release of assets to sell those assets in order to fund his criminal defense. (R. 107). While denying the continuance motion, the district court granted the motion to release assets and approved the sale of up to $200,000 of the restrained real property and/or railroad memorabilia collection to fund the criminal defense. (R. 112-113). On December 19, 2002, Fletcher requested

reconsideration of the denial of the continuance motion based solely on the asset related issues and his need for an appropriate amount of time to liquidate these newly released assets. (R. 114-124). The government filed its opposition to the motion to reconsider on December 20, 2002. (R. 125-126), and the court denied the motion to reconsider three days later. (R. 127).

On December 26, 2002, Fletcher filed a timely notice of interlocutory appeal. In doing so, he sought review of the district court's order denying his motion to reconsider the denial of his motion to continue the trial because that action effectively denied Fletcher the ability to use his released untainted assets to pay attorneys' fees and defense costs. (R. 132-134). Fletcher also filed a motion for a stay pending appeal (R. 128-131), which the government opposed. (R. 135-153). The district court denied the stay on January 2, 2003. (R. 154). A motion to stay which was filed in the Fourth Circuit was also denied.

Jury selection took place on January 13, 2003 and the trial commenced the following day. On the first day of trial, Fletcher lodged a continuing objection to the proceedings in light of his problems in funding his defense. (R. 330-331). During trial and prior to the submission of the case to the jury for consideration, Fletcher made various objections and orally moved for a judgment of acquittal on all counts. (R. 1902-1906). After the government rested its case, Fletcher rested without introducing evidence and proffered that his inability to introduce evidence resulted from the lack of available funds to pay the costs to have an expert testify regarding the accounting issues addressed by the government's summary witnesses. (R. 1898-99 & 1900-1902).

During the trial, the government attempted to prove that the funds laundered were obtained from government contract fraud which was charged under 18 U.S.C. §§ 286 & 287 – conspiracy to make a false claim and making false claims. These violations were alleged in the indictment and the evidence offered at trial was aimed at proving them. These violations were also the only ones discussed in connection with the money laundering count by either the prosecution or the court.

Indeed, the prosecutor argued that:

> . . . Count 10 in the Kerr Lake matter involves money laundering. Having once realized that they were obtaining money by submitting false claims, Mr. Fletcher through a series of transactions moved money through various accounts, starting with receiving the money in Slidell, transferring the money to the North Carolina account and the transferring it to the Big Oak account, then transferring it to the Mary Ann Berry Kerr Lake operating account, and then paying bills related to carrying on the activity. He furthered the activity with tainted money, money that had been tainted by his previous illegal activity of submitting false claims.

(R. 1915-16).

Similarly, the court instructed the jury that "[w]ith respect to the second element, the government must show that in fact the property was the proceeds of a false, fictitious or fraudulent claim against the government, which is a specified unlawful activity under the statute." (R. 1994). Petitioner, however, did not object to this instruction at trial.

The jury convicted Fletcher on counts 1 through 5, 10 through 14, 18 and 20. Fletcher was acquitted on counts 15 through 17 and 19. (R. 2022-2023). Fletcher filed post-trial motions seeking the entry of a judgment of acquittal or, alternatively, a new trial. (R. 2309-2324). The district court denied Fletcher's post-trial motions in all respects. (R. 2328-2331).

The district court sentenced Fletcher to 80 months imprisonment and a fine of $50,000.

3. Petitioner's Appeal

On appeal to the Fourth Circuit, petitioner contested his convictions and sentence on numerous grounds, three of which are relevant here: (i) for the first time on appeal, petitioner challenged his money laundering conviction claiming that it was not supported by a predicate crime (a specified unlawful activity) that is identified in the list of predicate offenses found in the money laundering statute; (ii) petitioner challenged his convictions arguing that his Sixth Amendment rights to expend his own untainted funds in his defense were violated by the district court's failure to release his assets in a manner which permitted their use to defend the criminal case; and (iii) for the first time on appeal, petitioner challenged his sentence under *Blakely v. Washington*, 124 S. Ct. 2531 (2004), a case decided while his appeal was pending, arguing that the imposition of an enhanced guidelines sentence based on facts not determined by the jury was a violation of the Sixth Amendment right to a jury trial.

The Fourth Circuit ruled on each of these issues without discussion stating that as to issues (i) and (iii) which were

raised for the first time on appeal "we have carefully reviewed the record and find no reversible error. *See United States v. Olano*, 507 U.S. 725, 732 (1993) (holding that issues raised for the first time on appeal are reviewed for plain error)." App. 2a. As to issue (ii) the Fourth Circuit stated that "[a]s to those issues raised before the district court, we affirm on that court's reasoning." *Id.*

REASONS FOR GRANTING THE PETITION

This case presents an opportunity for the Court to decide two important questions of federal criminal law that, if left unresolved, will continue to create confusion in the lower courts. First, the determination of whether a violation of 18 U.S.C. § 287, making a false claim, is a predicate offense for money laundering in the Fourth Circuit is necessary in order to ensure the uniform application of the federal criminal law to all citizens and to resolve the conflict created by the Fourth Circuit's ruling in this case. Second, the determination of what limitations the Sixth Amendment places on government efforts to civilly attach the untainted assets of an individual during the pendency of a criminal prosecution is necessary to prevent the government from using parallel civil proceedings to frustrate a defendant's ability to pay the costs of his own criminal defense with his own untainted funds. Finally, this petition seeks to have petitioner's sentence revisited in light of *United States v. Booker*.

I. THIS COURT SHOULD GRANT REVIEW AND RESOLVE THE CONFLICT CREATED BY THE FOURTH CIRCUIT'S HOLDING THAT A VIOLATION OF 18 U.S.C. § 287 IS A SPECIFIED UNLAWFUL ACTIVITY UNDER THE MONEY LAUNDERING STATUTE

In affirming petitioner's money laundering conviction, the Fourth Circuit has held that making a false claim in violation of 18 U.S.C. § 287 is a predicate offense - known as a specified unlawful activity – under the money laundering statute, 18 U.S.C. § 1956. This holding places the Fourth Circuit in apparent conflict with the express statutory language of the money laundering statute and with other circuits that have generally addressed the definition of a specified unlawful activity under the statute. This Court should address this conflict because the Fourth Circuit's decision to uphold a money laundering conviction based upon a predicate offense not listed in the statute sets an undesirable precedent which allows judicial expansion of a frequently used federal criminal law.

In order to sustain a conviction under 18 U.S.C. § 1956(a)(1)(A)(I), the government must prove that:

> (1) the defendant conducted or attempted to conduct a financial transaction . . . ; (2) the property that was the subject of the transaction involved the proceeds of specified unlawful activity; (3) the defendant knew that the property involved represented the proceeds of some form of unlawful activity; and (4) the defendant

> engaged in the financial transaction with the intent to promote the carrying on of specified unlawful activity.

United States v. Wilkinson, 137 F.3d 214, 220 (4th Cir. 1998) (citations omitted).

The second element requires that a financial transaction be conducted with proceeds of a specified unlawful activity. In prior opinions the Fourth Circuit stated that:

> [j]ust because the statute requires that funds be obtained from "specified " unlawful activity does not mean that the government is required to detail the circumstances of the unlawful activity. Rather, the term "specified unlawful activity" is a defined term referring to a list of offenses which qualify as unlawful activity for purposes of stating a money laundering offense. . . . [T]he definition of "specified unlawful activity" [is] given in 18 U.S.C. § 1956(c)(7), which in turn lists five separate categories of offenses that constitute "specified unlawful activity."

United States v. Smith, 44 F.3d 1259, 1265 (4th Cir. 1995).

In ruling on Fletcher's appeal, however, the Fourth Circuit, without discussion, seemingly endorsed the view that violations of 18 U.S.C. §§ 286 & 287 – conspiracy to make a false claim and making false claims – can serve as money laundering predicates even though they are not among the predicate offenses listed in the statute.

While the only possible specified unlawful activity presented to the jury at trial was the filing of false claims against the government, a careful review of the list of specified unlawful activity offenses found in 18 U.S.C. § 1956(c)(7) reveals that neither 18 U.S.C. § 287, nor 18 U.S.C. § 286 appear in that list or in any of the cross references contained in the list. Nor is there any legal basis to look beyond the statutory list. Indeed, the Fourth Circuit's holding here appears to take an approach in direct conflict with rulings from other circuits, *see e.g., United States v. Loe*, 248 F.3d 449, 468 (5th Cir. 2001), *United States v. Taylor*, 984 F.2d 298, 300-01 (9th Cir. 1993) and *United States v. Stavroulakis*, 952 F.2d 686, 690-91 (2nd Cir. 1992), and makes false claims violations specified unlawful activity under the statute. Because this approach causes a split between the Fourth Circuit and the other circuits, and is not supported by the language of the statute, the writ should be granted and the judgment of the Fourth Circuit reversed.

II. THIS COURT SHOULD GRANT REVIEW TO ADDRESS THE IMPORTANT SIXTH AMENDMENT ISSUE RAISED BY THE GOVERNMENT'S RESTRAINT OF UNTAINTED FUNDS

On July 16, 2002, more than sixth months after petitioner's indictment and with his criminal trial less than four months away, the government filed suit and obtained an order depriving him of virtually all of his assets. (R. 67). The immediate impact of the government's action was to cripple petitioner's efforts to defend himself in this criminal case by cutting off his ability to use his own untainted property to fund his defense. (R. 96-99).

Fletcher was successful in securing an additional trial continuance (R. 92) and, after a delay of almost five months from the time of the initial restraint, Fletcher obtained an order releasing assets to fund his criminal defense. (R. 112-113). The district court's order granting relief was of little help because it came alongside the court's denial of a continuance motion seeking additional time needed to liquidate the newly available assets. In essence, with no time to liquidate the assets and to use them to defend himself at the trial, Fletcher was left as he had been since July 16, without any ability to fund his criminal defense. (R. 120-122 & 158-161).

Petitioner seeks review of the Fourth Circuit's decision affirming his conviction and denying his claim that his Sixth Amendment rights were violated by the unlawful restraint of his property which was needed to fund his criminal defense. In seeking review, Fletcher asks this Court to hold that a district court cannot satisfy the burdens imposed by the Sixth Amendment by ordering the release of assets on one hand, but denying the time necessary to use those assets on the other. To permit such a result is to elevate form over substance. Clearly the Sixth Amendment issue here – the right to counsel of choice and the attendant right to pay for one's own defense – is focused on actually paying the costs of the process and not simply the idea that a defendant will have some future ability to do so post-trial. If the assets cannot be liquidated given the constraints of the criminal trial calendar, they remain unavailable for the most important purposes, *i.e.*, to hire experts, to pay investigators, to fund travel expenses, to subpoena witnesses and to pay counsel.

This Court held more than sixty years ago that "[i]t is hardly necessary to say that, the right to counsel being

conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama*, 287 U.S. 45, 53 (1932). More recently in *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989), this Court held that "[w]hatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond the individual's right to spend his own money to obtain the advice and assistance of . . . counsel." *Id.* at 626 (citations and quotations omitted). The corollary to this statement is that the Sixth Amendment does guarantee an individual a right to spend his own money to defend himself and to pay counsel of choice.

It was precisely this concern that the district court had in mind when it granted petitioner's motion to release assets to pay attorneys' fees and defense costs. Unfortunately, however, the district court refused to recognize the significant impact that time would have on its asset release order. (R. 154). The order permitted the sale of up to $200,000.00 of the restrained property to pay criminal defense fees and costs. (R. 112-113). The order, however, was not entered until a little more than one month prior to the commencement of the trial. The result was to alter the deprivation from one of access to property, to one of access to sufficient time to convert that property into currency useful in paying fees and costs. (R. 122). While the district court's order took steps towards resolving the Sixth Amendment problem, it fell far short of securing what the Sixth Amendment requires, that the defendant's right to counsel of choice and his access to his own property to fund his criminal defense be protected from government interference. In failing to do so both the district court and the Fourth Circuit permitted the government's civil restraint of petitioner's untainted assets to interfere with and to prejudice his legal defense at trial.

Because this ruling is in conflict with the clear holding of this Court regarding the Sixth Amendment right to pay counsel with one's own funds, this case should be reversed.

III. THIS COURT SHOULD GRANT THIS PETITION AND REMAND THE CASE FOR RECONSIDERATION IN LIGHT OF THE COURT'S DECISION IN *UNITED STATES v. BOOKER*

Based on his trial convictions, Fletcher was sentenced under the guidelines to a term of 80 months in prison. In order to calculate his sentence the district court applied a variety of enhancements in addition to the base offense levels for the counts of conviction. These enhancements included: (1) an increase for the amount of loss; (2) an increase based on a finding of leadership; and (3) an increase for obstruction of justice. All told, these enhancements, based on facts found by the sentencing court by a preponderance of the evidence, rather than by the jury beyond a reasonable doubt, added 64 months to Fletcher's sentence. Applying the sentencing guidelines to the counts of conviction without these judicially determined fact driven enhancements, Fletcher's maximum sentence was 16 months. In contrast, this fact finding increased Fletcher available maximum sentence to 97 months' imprisonment and the court sentenced Fletcher to 80 months. Because the court could not have legally imposed an 80-month sentence based solely on the jury's guilty verdicts, Fletcher's sentence is invalid and was imposed in violation of the constitution.

While the law of the Fourth Circuit precluded such a determination at the time Fletcher's appeal was decided, *see United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004),

this Court's recent ruling in *Booker* is to the contrary. In *Booker* this Court noted:

> Accordingly, we reaffirm our holding in Apprendi: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

Booker, 125 S. Ct. at. 756.

Fletcher submits that he is entitled to relief from a sentence which was imposed in violation of his Sixth Amendment right to trial by jury and urges this Court to grant the petition, vacate the judgment below and remand this case for reconsideration in light of *Booker*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED NOVEMBER 18, 2004

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03-4493

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

WAYNE ALLEN FLETCHER,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Malcolm J. Howard, District Judge. (CR-02-8-HO)

Submitted: October 4, 2004 Decided: November 18, 2004

Before WILLIAMS and SHEDD, Circuit Judges, and Henry E. HUDSON, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

Appendix A

PER CURIAM:

After a jury trial, Wayne Allen Fletcher was convicted of numerous crimes he committed while involved in a conspiracy to overcharge the government for cleanup services rendered after Hurricane Fran devastated North Carolina. The evidence, viewed in the light most favorable to the Government, showed that Fletcher and his cohorts intentionally defrauded the government, and that Fletcher took various steps to conceal the fraud. Fletcher has raised several challenges to his conviction and sentence. As to those issues raised before the district court, we affirm on that court's reasoning. (J.A. at 127, 2328-31.) As to the remaining issues, which were raised for the first time on appeal, we have carefully reviewed the record and find no reversible error. *See United States v. Olano*, 507 U.S. 725, 732 (1993) (holding that issues raised for the first time on appeal are reviewed for plain error). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, WESTERN DIVISION FILED APRIL 4, 2003

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION

No. 5:02-CR-8-1H3

UNITED STATES OF AMERICA,

v.

WAYNE FLETCHER,

Defendant.

This matter is before the court on defendant's motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29 or in the alternative, a new trial. After a two week jury trial, the defendant was convicted of one count of conspiring to defraud the government, in violation of 18 U.S.C. § 286, five counts of knowingly making false or fraudulent claims against the United States, in violation of 18 U.S.C. § 287, one count of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(i), three counts of possessing false papers to defraud the government, in violation of 18 U.S.C. § 1002, one count of witness tampering, in violation of 18 U.S.C. § 1512(b)(3), and one count of influencing a witness, in violation of 18 U.S.C. § 1503(a).

Appendix B

Defendant was found not guilty of two counts of soliciting kickbacks, 41 U.S.C. § 53, one count of knowingly making false or fraudulent claims against the United States, 18 U.S.C. § 287, and one count of obstruction of a criminal investigation, 18 U.S.C. § 1510(a).

I. Motion for Judgment of Acquittal

Under the criminal rules, a court shall issue a judgment of acquittal on motion by the defendant only if the evidence adduced at trial is insufficient to sustain a conviction for the offense charged. Fed. R. Crim. P. 29. The court concludes that sufficient evidence supported the jury's verdicts. Defendant's principal contention is that the government failed to prove the requisite *mens reas* requirements of the criminal statutes listed above. However, reviewing the evidence in the light most favorable to the government, the court finds that a "rational trier of fact could have found the essential elements of the crime[s] beyond a reasonable doubt." *U.S. v. Chorman*, 910 F.2d 102, 104 (4th Cir. 1990).

The court also finds that the "willful blindness" jury instruction was warranted. "Fletcher's defense was built, in large part, around a lack of knowledge," as defendant concedes in his motion. (Def. Mot. p. 10). Furthermore, defendant reinforced this stance in his "theory of the defense" jury instruction, which the court also admitted, stating

> With respect to Count ONE charging him with conspiring to defraud the United States by submitting false claims, and Counts TWO through FIVE charging the defendant with making false

claims related to the Kerr Lake State Park contract, WAYNE ALLEN FLETCHER avers that he never entered into any unlawful agreement with anyone to inflate invoices for work done at Kerr Lake, and to the extent that any fraud was committed by individuals performing the work, those individuals acted without the knowledge, involvement or approval of WAYNE ALLEN FLETCHER.

The defendant also avers that he did not know or have any reason to believe that the invoices referred to in COUNTS TWO through FIVE were false when Smith Truck submitted them to the State in that the invoices were based on daily reports which had been signed by both the contract manager, DRC, and a park ranger as required by the contract.

WAYNE ALLEN FLETCHER asserts that he did not launder money as alleged in COUNT TEN in that he had no knowledge of the alleged fraud in the Kerr Lake contract. The defendant also asserts that the financial transactions which the government alleges are money laundering here were not conducted with any intent to promote a specified unlawful activity.

With respect to the Hopkins site, the defendant asserts that he was not aware at the time he submitted the request for $151,000 to the Army Corp of Engineers that J.O. Barnes had failed to

bring the material to a permitted site, namely Phoenix recycling, as required by the contract. He further asserts that he did not have reason to believe the papers used in support of the request were, in fact, inaccurate at the time they were submitted and he had no intent to defraud the United States.

Finally, with respect to the Counts related to the Termination Claim, including those charging witness tampering, the defendant avers that the termination claim accurately reflected the number of workers that Sidney Mitchell was expected to have working for him under the contract. WAYNE ALLEN FLETCHER asserts that his discussion with Mitchell concerning Mitchell's debt to Smith Truck and the company's debt to Mitchell was not an attempt to corruptly persuade Mitchell in connection with the investigation and that he did nothing more than inform Mitchell of the status of both debts.

Thus, the evidence supported "an inference of deliberate ignorance on the part of [the] defendant." *U.S. v. Abbas*, 74 F.3d 506, 513 (4th Cir. 1996). While, the evidence did not foster an inference of defendant's knowledge based on "mere careless disregard or mistake." *U.S. v. Guay*, 108 F.3d 545, 551 (4th Cir. 1997). Accordingly, defendant's motion for a judgment of acquittal is DENIED.

Appendix B

II. Motion For A New Trial

Rule 33 of the Federal Rules of Civil Procedure authorizes a district court to grant a new trial "if the interests of justice so require." Fed. R. Crim. P. 33. The standard of review used under Rule 33 depends on the nature of the defendant's claims. Defendant premises this motion on a "deprivation of funds" and "spillover from improperly charged counts." The court finds defendant's contentions baseless. First, the defendant was afforded over one month to liquidate personal assets in order to fund his defense. Second, as to the spillover issue, the court rejects defendant's asseverations of prejudice. As stated above, there was sufficient evidence to support defendant's convictions. *Chorman*, 910 F.2d at 104. Thus, defendant's motion for a new trial is DENIED.

This 4th day of April, 2003.

s/ Malcolm J. Howard
MALCOLM J. HOWARD
United States District Judge

At Greenville, NC

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, WESTERN DIVISION FILED DECEMBER 23, 2002

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION

No. 5:02-CR-8-1H3

UNITED STATES OF AMERICA,

v.

WAYNE ALLEN FLETCHER,

Defendant.

ORDER

This matter is before the court on defendant's motion to reconsider the court's denial of his motion to continue on December 11, 2002. Insufficient cause appearing, the motion to reconsider is DENIED, and trial in this matter remains scheduled for January 13, 2002.

This 23rd day of December, 2002.

s/ Malcolm J. Howard
MALCOLM J. HOWARD
United States District Judge

At Greenville, NC

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING FILED DECEMBER 21, 2004

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-4493
CR-02-8-HO

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

WAYNE ALLEN FLETCHER

Defendant - Appellant

ORDER

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

Entered at the direction of Judge Williams, with the concurrence of Judge Shedd and Judge Hudson.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX E — CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

1. The Sixth Amendment to the United States Constitution states that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

2. Title 18, United States Code, Section 1956 states in pertinent part:

> § 1956. Laundering of monetary instruments
>
> (a)
>
> (1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

Appendix E

(A)

(i) with the intent to promote the carrying on of specified unlawful activity;

* * *

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(c) As used in this section—

* * *

(7) the term "specified unlawful activity" means—

(A) any act or activity constituting an offense listed in section 1961 (1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving—

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16);

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978;

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to

commissions or gifts for procuring loans), section 351 (relating to congressional or Cabinet officer assassination), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 831 (relating to prohibited transactions involving nuclear materials), section 844 (f) or (i) (relating to destruction by explosives or fire of Government property or property affecting interstate or foreign commerce), section 875 (relating to interstate communications), section 956

(relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country), section 1005 (relating to fraudulent bank entries), 1006 (relating to fraudulent Federal credit institution entries), 1007 (relating to Federal Deposit Insurance transactions), 1014 (relating to fraudulent loan or credit applications), 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnaping), section 1203 (relating to hostage taking), section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime

fixed platforms), section 2319 (relating to copyright infringement), section 2320 (relating to trafficking in counterfeit goods and services), section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), or section 2339A (relating to providing material support to terrorists) of this title, section 46502 of title 49, United States Code, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38 (c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 15 of the Food Stamp Act of 1977 (relating to

food stamp fraud) involving a quantity of coupons having a value of not less than $5,000, or any felony violation of the Foreign Corrupt Practices Act; or

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.).

(F) any act or activity constituting an offense involving a Federal health care offense.

2. Title 18, United States Code, Section 1961(1) states in pertinent part:

"racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201

(relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461–1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of

passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581–1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to

trafficking in certain motor vehicles or motor vehicle parts), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501 (c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, or (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain;

Supreme Court, U.S.
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No. 04-1331

In the Supreme Court of the United States

WAYNE ALLEN FLETCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *United States* v. *Booker* and *United States* v. *Fanfan*, 125 S. Ct. 738 (2005). In *Booker* and *Fanfan*, this Court held that the Sixth Amendment, as construed in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), applies to the federal Sentencing Guidelines. *Booker*, 125 S. Ct. at 748-756 (Stevens, J., for the Court). In answering the remedial question in those cases, the Court then applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for reasonableness. *Booker*, 125 S. Ct. at 757-769 (Breyer, J., for the Court). Accordingly, the appropriate disposition is to grant certiorari, vacate the

judgment of the court of appeals, and remand the case for further consideration in light of *Booker* and *Fanfan*. The court of appeals can then decide what effect, if any, those decisions have on petitioner's sentence, taking into account any applicable doctrines of waiver, forfeiture, and harmless error.* See *id.* at 769.

PAUL D. CLEMENT
Acting Solicitor General

APRIL 2005

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* The government waives any further response to the petition unless the Court requests otherwise.